No. 79-1740

In The
Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Constitution entitles electric customers to proprietary and voting control of a water reclamation district that sells electricity to support reclamation but whose powers, functions, and relationships between entrepreneurial risk and voting control differ in no material way from those of a privately owned electric utility.

2. Whether, under this Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), the test for determining the constitutionality of special district elections continues to turn on the nature of the district's functions and the disproportionate effect of its activities on landowners as a group, or whether the test now depends on subjective judicial assessment of the size of the district and the number of its customers.

GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, THOMAS P. HURLEY, JR., WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH, and THOMAS J. FINLEY, in their capacity as members of the Board of Directors, Salt River Project Agricultural Improvement and Power District, and KARL F. ABEL, in his capacity as President of the Salt River Project Agricultural Improvement and Power District,

Appellants,

vs.

ROLAND W. JAMES, JAMES R. FITZSIMMONS, DWIGHT M. BRAHS, FRANK SACCO, and JOHN H. MAFFEO, on behalf of themselves and their respective classes,

Appellees.

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BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the Court of Appeals (J.S. App. A) is reported at 613 F.2d 180.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on October 12, 1979. The petition for rehearing, timely filed, was denied on February 6, 1980. A notice of appeal to this Court was filed on February 13, 1980. The Jurisdictional Statement was filed and the appeal docketed in this Court on May 2, 1980. Probable jurisdiction was noted on October 6, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Revised Statutes §§ 45-909 and 45-983 provide as follows:

§ 45-909. Qualifications of electors

No person shall be entitled to vote at any election held under the provisions of this chapter unless he possesses all the qualifications required of electors for state officers under the general election laws, and is the owner of record of real property located within the boundaries of the district as of sixty days preceding a district election, and on which he has been assessed for county taxes as shown by the county tax roll next preceding the date of the election.

§ 45-983. Acreage system of voting

A. The petition for organization of the district may provide that each owner of land shall have one vote, or may provide for voting on an acreage basis.

B. Except as provided in § 45-965, subsection D, if the district is or has been organized under a provision for voting on an acreage basis, each landowner possessing the qualifications of an elector shall be entitled to cast one vote at all elections after the organization election on each office to be filled, or each question submitted, for each acre of land within the district owned by him.

C. Except as provided in § 45-965, subsection D, from and after the effective date of this act each landowner possessing the qualifications of an elector who owns less than one acre of land within the district shall be entitled to a fractional vote on each office to be filled or each question submitted. The fractional vote shall be equal to the fraction of an acre owned by such elector.

D. If land is held in more than one name, each owner otherwise possessing the qualifications of an elector may vote the number of acres or fractions thereof represented by his legal interest or proportionate share of and in the lands.

E. The result of each election shall be determined by a majority of the acres voted as provided in subsections B, C and D of this section.

F. The district shall maintain a record of the persons owning real property within the boundaries of the district as such ownership appears on the records of the county recorder and the number of votes or fractions thereof the owner thereof shall be entitled to vote.

STATEMENT OF THE CASE

A. Nature of the Case.

This appeal involves the constitutionality of the acreage-based election procedures of one of the nation's oldest and largest federal reclamation projects. The District Court held these procedures constitutional, and the Court of Appeals in a divided opinion held them unconstitutional.

The Salt River Project stores and delivers untreated water to the owners of the water. Those owners of water are the landholders of 236,000 acres located in Central Arizona, including part of what is now the Phoenix metropolitan area. Over the 78 years of its existence, the primary purpose of the Salt River Project has been the storage, conservation, and delivery of water. The Project does not own the water, nor does it treat it. It merely stores and delivers water belonging to others. In every case, ownership of the water—and therefore entitlement to delivery by the Salt

River Project—is tied directly to land ownership.[1]

For the purpose of subsidizing its water operations, "following the longstanding reclamation principle, electric revenues . . . are used to support water and irrigation operations, thereby keeping water delivery charges at reasonable levels. At the same time, the [Project] maintains rates for the electric service it provides which are comparable to those of neighboring utilities." (Exhibit K, p. 4, of Facts).

Since it is a federal reclamation project, title to many of the Salt River Project properties is vested in the United States. In addition, the Secretary of the Interior has ultimate supervisory powers over it. (Facts ¶59, J.A. 40). Since 1917, however, the Project management has been the responsibility of either the Salt River Valley Water Users Association (Association) or, since 1937, the joint responsibility of the Association and the Salt River Project Agricultural Improvement and Power District (District). The Association is a private corporation organized under the laws of the Territory of Arizona, and the District is an agricultural improvement district, a special district denominated a political subdivision of the State of Arizona. It is the Board of Directors of the District whose election is at issue here.

B. Historical Background.

The District's landowner-based voting system is grounded generally in federal reclamation law and history and more particularly in the history of irrigation and reclamation in the Salt River Valley.

Agricultural development of the Valley began in the 1860's. A fertile but arid land whose usefulness has always depended on an adequate water supply, its development reached a barrier by the turn of the century. The farmers of

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[1] Stipulated Statement of Facts ¶¶ 39, 41, and 43, J.A. 33-35. The Stipulated Statement of Facts (Facts) is reproduced in the Joint Appendix and as Appendix C to the Jurisdictional Statement. The balance of the Record consists of Exhibits A-Z, AA, and BB to the Stipulated Statement of Facts.

the Valley, who were attempting to irrigate approximately 150,000 acres of land by diverting water from the Salt River through canals, were unable to control the erratic flow of the River. A long drought in the 1890's had significantly reduced the River's flow. At other times recurring floods washed out brush diversion dams, interrupting delivery of water to the lands to which it had been appropriated. It was apparent that cooperative action to store the waters of the Salt River and to insure a dependable supply of water for agriculture was necessary to further development of the Valley.[2]

In 1895, some farmers in the Salt River Valley formed the "Farmers Protective Association," for the primary purpose of securing legislation favorable to their interests. Salt River Valley farmers were in fact instrumental in securing the passage of the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.* (Facts ¶5, J.A. 21). Under that Act, the United States advanced interest-free funds to purchase and construct integrated systems of reclamation works, to be repaid by the owners of the lands benefited.

The Salt River Project, authorized by the Secretary of the Interior on March 14, 1903, was one of the earliest projects created under the 1902 Act.

The potential for generating and selling hydroelectric power in connection with reclamation projects led Congress in 1906 to authorize sale of power "wherever . . . an opportunity is afforded for the development of power under any project". 43 U.S.C. § 522. Almost from its beginning, the Salt River Project has generated and sold electric power incident to and in support of its primary water activities. (Facts ¶¶ 12 and 17, J.A. 24, 25). These activities include

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[2] See Facts ¶5, J.A. 21. The Court's opinion in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), authored by Mr. Justice Rehnquist, recounted in detail the "peculiar problems of adequate water supplies" in the Western part of the country which led to the creation of special purpose water districts. 410 U.S. at 721-23. The discussion is pertinent to this case as well.

water conservation, thereby making more water available to all of its users. (See Exhibits L, M, N, O, and P of Facts). Because of the scarcity of water in Arizona, water conservation is central to a broad range of public policy issues facing Arizona's policy makers. The water conservation benefits generated by electric sales inure to all Project lands, agricultural and residential alike.

The Salt River Valley Water Users Association was formed in 1903, as the legal entity that could satisfy the requirement of the 1902 Act that Project water users repay to the United States the costs of constructing and augmenting reclamation projects. The Association's Articles of Incorporation were drafted in cooperation with officers of the Federal Reclamation Service. The Articles give the subscribed lands the right to delivery of federal reclamation water in proportion to acreage. They further authorize acreage-proportionate stock assessments to meet the Association's income needs. Those stock assessments become a lien on the subscribed lands until paid. The articles also provide for ownership and voting rights in proportion to acreage subscribed into Association membership. (Facts ¶8, J.A. 22, and Exhibit A to Facts).

Only persons who subscribed their lands into Association membership—with the accompanying burdens and risks to themselves and their lands—are entitled to participate in the benefits of the Project. The landowners also made substantial cash investments in the form of acreage stock assessments, which became especially burdensome in the 1920's and 1930's. (Facts ¶19, J.A. 25-26). Thus the "risk capital" for the creation of the Salt River Project was the money and lands of the subscribing farmers. Those lands and their owners were also the intended beneficiaries of the Project's activities, if successful.

Over the years since the Project's initial creation, changes have occurred in the way its purpose is achieved. Probably the most significant change is that the landowners incurred further risk to impound additional waters and to

create an electric system for the purpose of enhancing revenues. But the purpose has always remained the same: to conserve and deliver water at low cost to lands whose owners were willing to provide the capital for this water reclamation project. (Facts ¶¶ 16, 17, 32, 34, J.A. 24-25, 31). Their lands have in fact benefited. "Because of the assurance of this indefinite supply of water, the assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association." (Facts ¶55, J.A. 39).

In 1917, the Association and the United States entered into a contract obligating the Association to operate and maintain the Project as agent for the Government. (Exhibit C to Facts). The agreement requires the Association to maintain all works in proper operating condition and to deliver water to those entitled to it. (¶3 of Exhibit C to Facts). It may return the Project to the United States for any reason on March 1 of any year upon one year's notice. The United States may resume operation of the Project should the Association fail to carry out the law or the terms of the contract. (Id. ¶19).

The Association operated the Project directly from 1917 to 1937. In the 1920's and early 1930's, the Association heavily encumbered shareholders' lands to construct additional dams and other works in the Project. (Facts ¶¶ 13, 14, J.A. 24). During the Depression, the Association faced the need to reduce its borrowing costs for the financing of the new dams. Creation of a special district which could issue bonds, the interest on which would be free from income taxation, seemed to provide the solution. Arizona's Agricultural Improvement District Act of 1922 permitted the creation of special districts known as agricultural improvement districts within federal reclamation projects for the

purpose of developing and delivering water to the lands of the district. Since an agricultural improvement district is a political subdivision of the State of Arizona, the interest on its bonds is exempt from federal income tax.

Notwithstanding the tax and consequent bondmarketing advantages, many of the Association's shareholders objected to a proposal to form an agricultural improvement district as the vehicle for raising needed capital funds. One of the reasons was that, under the 1922 Act, voting for a district's Board of Directors would be per capita among landowners, rather than by acreage as in the Association. (Facts ¶21, J.A. 26). This would have meant that the landowners would bear the risk of bringing the District into existence without voting control proportionate to their risk, and many were unwilling to transfer to such an entity the Association's assets and powers of operating the Project. Representatives of the Association, therefore, requested the Arizona Legislature to amend the Agricultural Improvement District Act to conform the voting system of the Act to that of the Association. The Legislature enacted the necessary amendments in 1936. The Legislature also changed the *ad valorem* taxing power of such districts to an acreage taxing power to mirror the Association's stock assessment power. The District was created in 1937, with boundaries essentially identical to those of the Association.

It is undisputed that without acreage voting the Association would not have transferred title to its property and control of the Project to the District. (Facts ¶33, J.A. 31). Therefore, absent acreage voting, there would have been no District, and the ownership and control of both the power and the water systems (subject to Federal interests) would have remained in the Association.

Under an agreement made in 1937 and approved by the United States, the Association transferred its property to the District, subject to the paramount interest of the United States, and authorized the District to perform the Association's contract obligations as its agent. (Facts ¶¶ 24

and 32, J.A. 28, 31). The Association in turn agreed to continue to operate and maintain the Salt River Project on behalf of the District. (Facts ¶24, J.A. 28). As amended in 1944 and 1949, the contract now provides that the District itself directly operate the power and water storage functions, and the Association operates the water delivery system as agent for the District. Each acts as agent for the other. The net result is that since 1949 the District has operated the power activities and water storage activities and, through its agent the Association, the water delivery activities.[3]

All of these activities of both the Association and the District are carried out against the background of the stipulated fact that the primary purposes of the Salt River Federal Reclamation Project, the Association, and the District are the development, storage, and distribution of water for the irrigation of arid and semi-arid lands. (Facts ¶¶ 12, 16, 17, 32, 34, J.A. 24-25, 31). The development and sale of electrical power was undertaken by the Federal Reclamation Project, the Association, and the District, not for the primary purpose of providing electricity to the public, but rather to provide financial support to the Project's primary irrigation functions. (Facts ¶17, 34, J.A. 25, 31).

C. District Organization and Voting.

Originally, the method of electing the District's governing body—its Board of Directors—was the same as that used by the Association: one vote per acre. There have been two subsequent changes. In 1969, the Arizona Legislature amended the Agricultural Improvement District Act to permit the owners of less than one acre to cast a fractional vote, proportionate to their acreage. The practical effect of this change was to enfranchise medium and small landowners. The second change occurred in 1976 after the District Court had dismissed this suit. Before 1976, each of the ten directors was elected from a designated geographic electoral

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[3] The historical explanation for this arrangement is set forth in the Facts ¶25, J.A. 28-29.

§ 45-961A2 (1956)). The Legislature in 1976 enlarged the Board to 14 and provided that the four additional members were to be elected at large, with each landowner in the district having one vote.[4] In addition to its 14 Board members, the District also has a President and Vice President who are elected at large on an acreage basis. (Facts ¶26, J.A. 29).

The District and the Association have identical constituencies, identical purposes, identical management, and essentially identical boundaries. (Facts ¶31, J.A. 30). The Arizona Supreme Court has stated that the relationship between the two is one of "alter egos in substance, though not in law." (Facts ¶23, J.A. 27).

Thus, the Salt River Project—consisting of two alter ego entities, the District and the Association—began 78 years ago as a private stock corporation organized under the laws of the Territory of Arizona. This corporation, the Salt River Valley Water Users Association, later became the managing agent of the Salt River Reclamation Project for the United States. About two decades later, the District was formed. As a result of the District's political subdivision status, the interest on its bonds became tax free. The State in effect transferred to the Salt River Project the tax exempt quality of state and local governmental debt, a result that is achieved in more modern times for diverse businesses through the issuance of industrial development bonds.[5] Indeed, bonds whose interest is free from federal income tax because of Arizona statutes have been used for pollution control purposes by the State's other major electric utilities.[6]

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[4] Ariz. Rev. Stat. Ann. §§45-961 B, 45-963, and 45-983 (Supp. 1980).

[5] *See, e.g.*, Ariz. Rev. Stat. Ann. §§9-1151 *et seq.* (1977 & Supp. 1980).

[6] *See*, Ariz. Rev. Stat. Ann. §§9-1221 *et seq.* (1977 & Supp. 1980).

D. Power Functions as Proprietary Support for Water Development.

Applying power revenues to reduce water costs is a long-standing reclamation principle. (See 43 U.S.C. §§ 485(c), 522, 598, 501, and 825t; Ariz. Rev. Stat. Ann. §45-2201 Revisor's Note (Supp. 1980); See also Exhibit K to Facts, p.4). The Salt River Project is no exception. Over the last ten years, an average of $10 million per year from the District's power revenues has been applied to reduce water costs. (Facts ¶45, J.A. 36).

There is no question, however—indeed the parties have stipulated to the fact—that "the development and sale of electrical power ... was undertaken not for the primary purpose of providing electricity to the public but to support the primary irrigation functions by supplying power for reclamation uses and by producing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands." (Facts ¶17, J.A. 25).[7]

E. Water Functions.

The District and the Association service the water rights of more than 236,000 acres of assessed land through a system of six reservoirs with 2,072,050 acre-feet storage capacity, 131 miles of canals, 875 miles of laterals, and 263 miles of drainage or waste ditches. (Facts ¶44, J.A. 36).

Though large in size, the Project's water functions are narrow in scope. They are not analogous to the municipal water functions of a city. The District and the Association own no water. They do not buy or sell water. They do not treat water. They have no say over the use to which water is

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[7] The Arizona Supreme Court observed in *Uhlmann v. Wren*, 97 Ariz. 366, 392, 401 P.2d 113, 124 (1965), that the District's power activity could only be "an incidental phase of reclamation, not a primary or independent end in itself," because the only reason for sale of power is "the use of power revenue to support its primary irrigation and reclamation functions."

put. The Project only stores water behind its dams, minimizes water loss through conservation practices, and then delivers water through the Project canals to the landowners who own it. Therefore, the District and Association are not in the "water business" in the same sense that a city or water company might be in the water business. Their stewardship is over a federal reclamation project. The Project merely stores, conserves, and delivers water that belongs to other people.

Approximately 75% of the water delivered by the District is used by its owners for agricultural and other irrigation purposes. Included in that 75% is about 15% used for "non-agricultural but predominately irrigation uses, including parks, playgrounds, schools and subdivision irrigation." (Facts ¶74, J.A. 48). The other 25% is delivered to municipalities. The water delivered to municipalities falls into one of two categories. The categories are (1) water appurtenant to land owned by the cities, and (2) water appurtenant to land owned by city residents who have chosen not to take delivery directly from the Project and have allowed the cities to take delivery as their agents. The agency arrangements between those landowners and their cities are specified in contracts between the Association and the cities involved, under which the cities pay on behalf of those landowners the same assessments and water charges that those landowners would pay if they elected to take their water deliveries directly from the Project. (Facts ¶41, J.A. 34). Landowners who allow the cities to take delivery of their water may revoke their consent and resume taking their water themselves at any time.[8]

The lower court erroneously asserted that "nearly 40% of the water delivered by the District is used and paid for in a manner unrelated to agriculture *or land ownership.*" (J.S.App. A-6, 613 F.2d at 184, emphasis added). This factual assertion was key to the Court of Appeals' holding; the opinion later states: "In view of the magnitude of the elec-

[8] There are 8 such cities; see Facts ¶¶ 42, 75, and 82, J.A. 35, 48, 52.

tric utility operations and the *large percentage of the water services which are used and paid for in a manner unrelated to land ownership,* it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners." (*Id.*, emphasis added).

This factual underpinning of the Court of Appeals' holding is flatly false. Every penny charged for handling Project water is based on land ownership, including all Project water delivered to cities. The parties have not only stipulated that entitlement to water is tied to land ownership (Facts ¶¶ 39 and 40, J.A. 33-34), they have also stipulated concerning the relationship between acreage voting and the existing rights and burdens of landowners. (Facts ¶43, J.A. 35).

The amount of water to which any landowner is entitled consists of two components: (1) normal flow and (2) stored and developed waters. Under Arizona law, all surface water rights are appurtenant to the land. Rights to the normal flow of the river are determined according to the time priority by which the river's waters were beneficially applied to the land. (See Facts ¶39, J.A. 33, and the Kent Decree referred to therein). Rights to stored and developed waters (above the normal flow of the river) are divided equally on an acreage basis among all Association-subscribed land. (Facts ¶¶ 39 and 40, J.A. 33-34). Thus, contrary to the Court of Appeals' assertion, normal flow water rights are approximately proportionate to acreage, and stored and developed water rights are exactly proportionate to acreage.

The Court of Appeals' statement that "the District is not concerned solely with providing water for agriculture" (J.S.App. A-6, 613 F.2d at 183) is correct but irrelevant. The District's function is the storage, conservation, and delivery of water to the landowners who own it in the amounts that they own. Both the entitlement to the water and also the amount of the entitlement depend exclusively on land ownership. The landowners' entitlement is to *water,* not to water for agricultural purposes. (Facts ¶40, J.A.

34). The use to which this water is put once it is delivered to its owners is of no concern to the District and has no relevance to the District's obligation to store and deliver water to cities, either in their own right as landowners or as agents for other landowners. The District has no power to dictate the use of any water.[9] The fact that cities or other owners may chose to treat and sell water after the district's delivery role is completed does not enlarge the limited nature of the District's function.

F. Power Functions.

The District is the second largest supplier of electricity in the State of Arizona, serving some 240,000 customers. (Facts ¶46, J.A. 36). The largest and third largest, Arizona Public Service Company and Tucson Electric Power Company, are both private corporations. (Exhibit K to Facts, p. 30). The District does not sell electricity to all areas within its boundaries, and it sells substantial electricity to persons outside its boundaries. (Facts ¶47, J.A. 37, and Exhibit Z to Facts). The District's boundaries were drawn virtually identically to those of the Association and of the Federal Reclamation Project. The sole criterion for those boundaries was whether the land could be benefited by agricultural irrigation, so town lands and high ground were excluded. (Facts ¶¶ 6, 38, J.A. 22, 32-33).

The District's power activities are, in effect, a business venture of the landowners to reduce the cost of water deliveries. (Facts ¶34; cf. ¶17; J.A. 31, 25). In a case involving the Salt River Project, the Arizona Supreme Court quoted from earlier decisions describing Arizona's irrigation districts and similar special districts as "purely business and economic and not political and governmental." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power*

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[9] Under Arizona law, a public carrier of raw water must deliver the water to the lands to which it belongs and has no power to say who shall receive it, much less to say what may be done with it after it is delivered. *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 65 P. 322 (1901); *Brockman v. The Grand Canal Co.*, 8 Ariz. 451, 76 P. 602 (1904).

District, 78 Ariz. 30, 41-42, 275 P.2d 393, 402 (1954). Viewed as a percentage of gross power revenues, the amount of District power revenues provided for water assistance is approximately equivalent to the dividends paid to common stockholders in comparable electric utilities. (Facts ¶56, J.A. 40). Its electric rates are also comparable to those of the State's two principal private electric utilities. (Exhibit K to Facts, pp. 4-30; Exhibit L to Facts, p. 1). In 1975, the year immediately preceding the Stipulation in this case, the annual agricultural water subsidy amounted to $8.89 per power customer. (Facts ¶84, J.A. 50). During that same year the amount of the subsidy for residential water came to $5.22 per power customer. (*Id.*)

The private investor puts his money at risk only because of anticipated profits. So also, these landowners, first in their capacities as shareholders of the Association and then in their capacities as electors of the District, put their money and their lands at risk to go into the electricity business for their own advancement as "the intended beneficiaries *inter alia* because electric revenues were to be used to reduce the cost of development, storage and distribution of water to District lands." (Facts ¶34; see also ¶17, J.A. 31, 25).

G. The District Has Only Limited Power.

Municipal-type powers enjoyed by the District are limited in number and in scope. The effect of state statutes, when read in light of other Federal statutes, is that the interest on the District's bonds is not subject to federal income tax. It is the same kind of benefit that many states confer upon a large variety of private corporations through devices such as industrial development bonds and pollution control bonds.

Arizona statutes also empower the District to impose an "acreage tax." This acreage tax applies only to member lands and is simply the mirror-image of the stock assessment power to which those lands were already subject by virtue of Association membership. The parties have stipu-

lated that "District taxes ... have the same effect as Association assessments." (Facts ¶ 22, J.A. 27). Therefore, the District's nominal acreage taxing power brought with it no real burdens, since all lands of the Disrict were already subject to the same duty by virtue of their voluntary subscription into the Association. Moreover, the District's acreage taxing power, if ever used by an acreage-voting constituency, would burden low density land far more than urban land. Therefore, the power is incapable of being abused to the unfair disadvantage of small landowners or non-landowners, and they need not fear it when in the hands of an acreage-voting constituency. (By contrast, an acreage taxing power in the hands of an urban electric customer constituency would be an instrument of great abuse of larger acreage, low density landowners.)

The District lacks those governmental powers that are the essential attributes of general government. The District cannot impose sales taxes or *ad valorem* property taxes. It cannot enact laws regulating the conduct of citizens residing within its boundaries. It has no authority to impose punishments for violations of any laws or regulations. It does not engage in any of the traditional functions associated with general governmental powers—streets, schools, sanitation, law enforcement, welfare or fire protection. The District has the power of eminent domain, but so do other private utilities in the State of Arizona. Ariz. Rev. Stat. Ann. § 12-1111 (1956). And, unlike all general purpose political subdivisions—indeed, unlike any other political subdivision in the State—the District makes *ad valorem* contributions in lieu of taxes on its property. Through the payment of these in lieu contributions, the District's electric operations are "in substance ... taxed by the State like any other privately-owned utility." (Facts ¶¶ 57 and 58, J.A. 40). The Arizona Supreme Court has repeatedly held, and has reiterated as recently as 1979 in *Neidner v. Salt River*

Project Agricultural Improvement and Power District, 121 Ariz. 331, 590 P.2d 447, that the District is essentially a private business venture whose public powers consist only of those necessary to carry out its business purpose.

H. Summary

The Salt River Project was brought into existence over three quarters of a century ago because landowners in the Salt River Valley put their lands and their money at risk in anticipation of enhancement of the value of those lands from the Project's water storage and delivery activities. Almost from the beginning, the water operations have been subsidized from the sale of electricity. This has been accomplished through electric rates competitive with those of private utilities, and the return to the landowners has been comparable to the return that would have been realized by private utility shareholders. The only difference is that the landowners opted to restructure their enterprise under a distinctive form of organization offered in the Agricultural Improvement District Act. The legislature has maintained a continuing interest in that form of organization and has frequently modified the statutes through which this development of water resources is encouraged and subsidized. As with any other business enterprise, the direct beneficiaries are the people whose assets made the venture possible. The customers, who purchase a service they desire, differ in no respect from customers of any electric utility.

I. The Proceedings Below.

This lawsuit was brought by persons living within the District as a challenge to the constitutionality of the statutes by which the District's directors are elected. On cross motions for summary judgment on stipulated facts the District Court held the statutory scheme constitutional and dismissed the complaint. By a divided vote, the Court of Appeals reversed the District Court's judgment. The Court of Appeals majority opinion focuses on the undisputed facts that the District is large and that its activities affect many people. In the language of the majority, "Although at one

time the Salt River District did bear some similarities to the District in *Salyer*, today the size and nature of the projects of the District and the effect of its operations on all of the residents of Arizona are more extensive than those of the district in *Salyer*." (J.S.App. A-5, 613 F.2d at 183). Judge Hall, in dissent, observed that "what the court is holding is essentially that the plaintiffs, solely because they are users, are entitled to participate in all of the benefits as owners in the management and operation of the defendant District." (J.S.App. A-11, 613 F.2d at 186).

Judge Hall was correct: the lower court majority in essence held that the Project's electric customers are entitled to control. The lower court's keying of control to the payment of electric bills is one of the two reasons its judgment must be reversed. The other reason is the majority's erroneous assumption that this Court's test in *Salyer* is based on size rather than function.

SUMMARY OF ARGUMENT

Over the 16 years since *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has stated with consistent clarity that the strict judicial scrutiny rule of that case does not apply to all entities that carry a municipal label.

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), marked out one set of circumstances in which the legislative determination will be upheld so long as it meets the highly deferential rational basis standard. This Court's decision in *Salyer* is the closest case to a squarely controlling precedent. Under *Salyer* the judicial examination of the District is twofold: the narrowness of its function and the disproportionality of its effect on landowners. Section II of the Argument discusses the *Salyer* standard and the reasons why that standard governs this case.

The distinctions between this case and *Salyer* are two. The Salt River Project District is larger than the district in *Salyer*, and it subsidizies its water conservation by the sale of electricity. Neither of the differences is relevant to the

constitutional test stated in *Salyer*, nor to any pertinent constitutional or policy considerations. The *Salyer* standard is keyed to the nature of the special district's function, not to its size.

The District therefore fits securely within *Salyer's* two part test. Moreover, there are factors in this case other than those relied on in *Salyer* which further militate in favor of the Arizona agricultural improvement district statutes. They are factors which relate to the nature of the plaintiffs' interests affected by the District. The standing of these plaintiffs to maintain this case or controversy rests on their status as electric ratepayers. Yet there is no distinction between the effects of this District on its ratepayers and the effects of any investor-owned utility on its ratepayers.

The appellees contend, as does the Court of Appeals, that since the ratepayers bear part of the financial burden of the Salt River Project, they should be entitled to control it. The financial burden borne by these plaintiffs as ratepayers is identical to the burden borne by the ratepayers of any electric company. The appellees make no financial contribution other than the payment of their monthly bills. Their sole financial stake in the enterprise is the cost of electricity and the stability of its supply. In addition to their economic interest, some of the plaintiffs might have an interest in such matters as District involvement in nuclear power and environmental controls. These are also indistinguishable from the interests of Arizona Public Service or Tucson Electric Power ratepayers.

If these appellee/plaintiffs are to succeed in overturning the policy choices of the Arizona Legislature, it must be because of some constitutional guarantee. Yet there is no constitutional value at stake which requires taking voting control away from the owners and giving it to the customers where the entity's effects on its customers are indistinguishable from those of any other investor-owned utility operated for the benefit of its owners. The identity of interest between the District's customers and other electric

customers, as well as the absence of any constitutional reason to give electric ratepayers control over a profit-making venture brought into existence by other people's risk, will be discussed in Section I of the Argument.

Section III discusses two lines of this Court's cases. In considering constitutional challenges to voting schemes, the Court has consistently reaffirmed that it is not only constitutionally permissible but also advisable for local governments to be creative in devising representational methods beyond traditional molds. In dealing with attempts to solve the unique problems of local government, this Court has rewarded rather than punished innovation.

Another line of this Court's cases has consistently accorded state legislatures a large measure of deference in determining economic policy, including the allocation of scarce resources. Both these lines of cases govern here. With respect to creativity and innovation Arizona's agricultural improvement district voter representation statutes are a unique legislative response to unique local problems. The cases prescribing broad deference to the legislature's judgment in economic matters are also controlling. The Arizona Legislature's authorization of landowner-created agricultural improvement districts represents an attempt to deal with some of the State's most fundamental economic issues. Moreover, what the Legislature has done in creating and periodically revising its agricultural improvement statutes is a lesser departure from one person, one vote prototypes than this Court has considered and approved in other cases.

ARGUMENT

I.

THE CONSTITUTION DOES NOT ENTITLE ELECTRIC CUSTOMERS TO PROPRIETARY AND VOTING CONTROL OF A WATER RECLAMATION DISTRICT THAT SELLS ELECTRICITY TO SUPPORT RECLAMATION BUT WHOSE POWERS, FUNCTIONS, AND RELATIONSHIPS BETWEEN ENTREPRENEURIAL RISK AND VOTING CONTROL DIFFER IN NO MATERIAL

WAY FROM THOSE OF A PRIVATELY OWNED ELECTRIC UTILITY.

Voting is a fundamental right when it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Under this standard, electing directors of an entity whose effects on its customers are no different from those of a private business does not trigger the application of the one person, one vote doctrine.

A. Arizona Law Defining the Business Purposes of the District.

The District was formed in 1937 solely as a "municipal" overlay on the Association to render interest on its debt securities exempt from federal income taxation. (Facts ¶32, J.A. 31). The status of such water districts as essentially business corporations had been well established in Arizona long before the formation of the District in 1937. Speaking of the District in 1954 in *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402, the Arizona Supreme Court quoted with approval its earlier characterization given in 1925 to irrigation districts in *Day v. Buckeye Water Conservation and Drainage District*, 28 Ariz. 466, 474, 237 P. 636, 638:

> Their formation is purely business and economic, and not political and governmental. They are formed in each case by the direct act of those whose business and property will be affected, and for the express purpose of engaging in some form of business, not of government.

Since such districts were not municipal in substance, they were held to be exempt from a state constitutional prohibition against any "municipality, or other subdivision of the state" lending its credit to, or purchasing stock in, private corporations. *Day v. Buckeye Water Conservation and Drainage District, supra.*

Indeed, in 1940 the Arizona Supreme Court invalidated a state statute exempting irrigation district property from taxation. *State of Arizona v. Yuma Irrigation District*, 55 Ariz. 178, 99 P.2d 704. The exemption fell under a state constitutional prohibition against tax exemptions other than for state and "municipal" property. In direct response, Article 13 § 7 to the Arizona Constitution was adopted declaring certain improvement districts, including agricultural improvement districts, to be political subdivisions of the state entitled to the privileges of municipal corporations. "... Article 13 § 7 was added for the purpose of re-establishing the immunity [from state taxation]." *Taylor v. Roosevelt Irrigation District*, 71 Ariz. 254, 258, 226 P.2d 154, 156 (1950).

However, while the enactment of Article 13 § 7 of the Arizona Constitution gave the District and other improvement districts immunity from state taxation,[10] "the adoption of the constitutional amendment in no sense altered the inherent characteristics of the district .... [W]e experience no difficulty in determining that the appellee corporation is in essence a business corporation ...." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954) quoting with approval from *Taylor v. Roosevelt Irrigation District, supra*. Concerning the District's status, the Arizona Supreme Court held that both before and after the constitutional amendment:

> The District's operations are conducted to enable it

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[10] This judgment of an earlier generation that the District should not pay taxes on its property did not withstand the test of time. By the early 1960's, public sentiment was that the District should pay the same property taxes on its electric facilities as other private utilities. Rather than amend the constitution solely to permit taxation of this District, the legislature provided in 1963 that the District could make voluntary contributions in lieu of taxes on its power facilities, which has been done since then. Ariz. Rev. Stat. Ann. §§ 45-2201 *et seq.* (Supp. 1980). Thus, it is stipulated: "In substance, the electrical facilities of the District are taxed the same as privately owned utility property." (Facts ¶57, J.A. 40).

> to 'function and accomplish the business and economic purposes for which it was organized'. *Local 266, I.B.E.W., supra*, 78 Ariz. at 43, 275 P.2d at 402.

The limited effect of the constitutional amendment was also clarified:

> 'We are of the opinion that the primary functions of these irrigation districts have not been changed by the Constitutional Amendment, supra, and in the conduct of their ordinary business, they are not exercising governmental or political prerogatives as they are not operated for the direct benefit of the general public but only of those inhabitants of the district itself.' (*Id.*)

Since it is a special district, the District bears a municipal label. In the services it provides and its effects on people's lives, however, the District is virtually indistinguishable from any other utility operated for the benefit of its owners. The District supplies electricity at retail to customers in Arizona. Arizona Public Service Company and Tucson Electric Power Company also supply electricity to retail customers in Arizona. The reason that Arizona Public Service and Tucson Electric Power are in the power business is that several decades ago investors were willing to put their property (money) at risk, and to leave it at risk from that time to the present in anticipation of a profit. Profits from the operations of those companies belong to their owners, the shareholders. Control is also vested in the shareholders. Those companies owe their existence to the Arizona corporation laws. It is Arizona law that allowed their investors to aggregate their risk capital with the inducement of electing the board of directors in proportion to their respective entrepreneurial risks.

Similarly, the reason that the Salt River Project is in the power business is that several decades ago property owners put their property (money and land) at risk and continue to

leave it at risk for the hope of beneficial return. (Facts ¶33, J.A. 31). Instead of dividends and stock appreciation, the return to the landowners is in the form of a water subsidy and increased land value.

Thus, Arizona has provided at least two statutory schemes by which property owners may put their property at risk in the generation and sale of electricity in anticipation of benefits to themselves. There is no less reason to protect the investment-back expectations of one set of property owners who place their assets at risk under the agricultural improvement district statutes than to protect the expectations of another set of property owners who placed property at risk under a different set of statutes dealing with stock corporations.

The state constitution and statutes *name* the District as a political subdivision enjoying the privileges of a municipal corporation. As has been shown above, these provisions have been authoritatively construed as not altering "the inherent characteristics of the district" as "in essence a business corporation." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954). The mere labeling of the District as public should not be controlling of the constitutional question here. If an entity's real and palpable consequences to people's lives are not of a quality and weight sufficient to implicate constitutional liberties, then surely the mere naming as "political subdivision" or "municipality" should not tip the scales differently.

B. The Plaintiffs Complain Only of Consumer Effects.

The legislature's authorization of agricultural improvement districts reflects a focused economic policy choice to encourage private risk-taking for the development of water resources by authorizing power sales to help pay for that development. This purely economic nexus between power sales and water development has long been followed in the arid West and in the federal reclamation laws themselves.

See 43 U.S.C. §§ 485(c), 522, 598, 501 and 825t; *see also* Ariz. Rev. Stat. Ann. § 45-2201, Revisor's Note (Supp. 1980) and p. 11 n. 7, *supra*.

The plaintiffs' recitation of the "effects" upon themselves which they claim entitle them to control the District is unintentionally revealing. They say that the District has "all the attributes of sovereignty and act[s] in a manner which vitally and significantly affects peoples lives . . . ." (Motion to Affirm, p. 12). Yet when this hyperbole is stripped down to its specifics, both the plaintiffs' real view of the case and the fatal defect of that view are effectively disclosed. Their list of "effects," including those that pertain to the District's water storage and delivery activities,[11] speaks exclusively to economic and customer effects. They complain that they must pay for the electricity they purchase and that the planning and financing of the utility affects the pace and direction of economic development for the community. Their principal benefit in taking over the District would be from reducing power rates by neglecting the duty to capital now fulfilled by the water subsidy. (Facts ¶60, J.A. 41). For some, the grievances might also extend to such issues as participation in environmental controls and nuclear generation. In either case, the only kinds of activities to which the Appellees object or

[11] The District's function as a mere storer and deliverer of water belonging to others is discussed *supra*, pp. 11-14. The plaintiffs say they are "affected" by the District's water storage and delivery function. But their real complaint is with what the owners of the water (who are the individual landowners) or the owners' agents (the cities) choose to do with the water *after* the District has completed its function of storing and delivering the water according to established property rights. Plaintiffs say they are affected by the availability or non-availability of water. That is certainly true. As people desiring to buy water for domestic use, they are affected by the willingness of the owners of that water to sell and the terms of sale acceptable to them. But that "effect" does not reach back far enough to touch what the District does. If the plaintiffs feel the Constitution gives them an equal say in the control and use of other people's water, then they should sue the people who own the water to establish such a right. But that should not give them a right to take control of the owners' servant merely because it tends the ditch.

even have standing to object are identical to the activities of private electric utilities and private businesses.

These plaintiffs have never been able to say how their interest in lower electric rates differs from the interest of their neighbors who take their electricity from Arizona Public Service and pay about the same price for it. The same is true of nuclear issues or environmental issues. Whatever interest these Appellees have in wresting control over such issues from the Project's owners, it differs not one iota from the interest of Arizona Public Service ratepayers or of other participants in a market economy.

It is against the background of this struggle for control of the Salt River Project that the core constitutional question comes into focus. The State of Arizona has chosen to encourage private investment in water reclamation subsidized by proprietary power sales. The question is whether the State is constitutionally entitled to achieve that objective through an entity whose electoral scheme does not rigidly adhere to the one person, one vote standard. Rather, it provides for the selection of the governing board by a combination system, predominantly risk-based and partially customer oriented.

Unless the Constitution permits Arizona that much policy-making leeway, the State's underlying objective—profit-motivated water reclamation—is doomed to failure. If the only reward for successful risk-taking is customer control, the entrepeneur will make his investments elsewhere.

C. The Court of Appeals Based Its Holding Upon an Erroneous View of Arizona Law.

The Arizona Supreme Court has never had any doubt about the business nature of, and the proprietary rights in, the District under state law. That Court has held:

> The ultimate parties in interest in both the association and the district are the landowners within the

identical boundaries of the association and the district. *Reichenberger v. Salt River Project Agricultural Improvement and Power District*, 50 Ariz. 144, 151, 70 P.2d 452, 455 (1937).

The public does not own the District. . . . Instead the owners are the private landholders. The profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit. The public interest is merely that of consumers of its product, for which they pay. . . . The District does not function to 'serve the whole people' but rather the District operates for the benefit of these 'inhabitants of the district' who are private owners. *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 44, 275 P.2d 393, 402-03 (1954).

Only last year in *Neidner v. Salt River Project Agricultural Improvement and Power District*, 121 Ariz. 331, 332, 590 P.2d 447, 448 (1979), the Arizona Supreme Court held:

The District's powers as a political subdivision are 'limited to the purposes justifying its political existence' and the provisions of Art. 13, § 7 do not alter the inherent characteristics of the District as 'a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized.'

These holdings by the Arizona Supreme Court as to the purposes, priorities, and powers of the District under state law are supposed to be binding on federal courts. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976). The Court of Appeals disregarded these controlling statements of Arizona legislative purpose and grounded its invalidation of the state statute in a very different understanding of the District's intended purposes, priorities, and powers:

The operation of the utility has taken on independent significance. In view of the magnitude of the electric utility operations and the large percentage of

> the water services which are used and paid for in a manner unrelated to land ownership, it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners. (J.S. App. A-4, 613 F.2d at 184, emphasis supplied).

The Court of Appeals has therefore grounded its holding on its view of Arizona legislative purpose contrary to that of the Arizona Supreme Court as well as ¶34 of the Stipulated Facts.

There is no constitutional principle that gives customers a right to control a business merely because it is chartered and assisted by the state, even if it is denominated a political subdivision. *Salyer* necessarily holds that much. The Constitution gives such a right only when the entity has sufficient governmental effects, within the principles of *Salyer*, that control is necessary to preserve "other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

Where a special purpose subdivision has no significant effect upon people's civil and political rights but rather exists as an instrument of the legislature's economic policies, carrying on essentially business activities, the need for close judicial supervision of the legislature's policy choices correspondingly diminishes.

II.

UNDER THIS COURT'S PRECEDENTS, THE CONTROLLING CONSTITUTIONAL TEST FOCUSES ON THE NATURE OF THE DISTRICT'S FUNCTION RATHER THAN ITS SIZE, AND THE ARIZONA STATUTES SATISFY THAT TEST.

The Salt River Project Agricultural Improvement and Power District bears a municipal label. It is a special district—an agricultural improvement district.

The reason for the acquisition of political subdivision status was the benefit of tax free bonds. That benefit in no way harms these Appellees, and they do not complain of it. As discussed in the preceding section, those characteristics of the District of which the Appellees complain are indistinguishable from those of any investor-owned utility.

This Court has held that the permissibility of individualized electoral systems for the myriad of special purpose districts turns on the nature of their activities. Where the entity's effects on those who would have control of it are not of the kind to trigger constitutional protection, mere variation in the quantum of activity should not change the result.

In *Salyer Land Co. v. Tulare Lake Water Basin Storage District,* 410 U.S. 719 (1973), and *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* 410 U.S. 743 (1973), this Court held the strict judicial scrutiny test of *Reynolds v. Sims,* 377 U.S. 533 (1964), and other cases inapplicable where two conditions are present: (1) the governmental entity has a special limited purpose and (2) its activities have a disproportionate effect on landowners as a group.

Factually, there are two differences between this case and *Salyer:*

1. The Salt River Project is larger and serves a larger number of people.

2. This District sells electricity as a subsidy for its primary water storage and conservation activities.

There are also similarities. Though the District serves many customers, its functions are limited in scope. And the disproportionate effect on landowners as a group is undeniable. Since water entitlements are tied to land ownership, so also are the benefits of the Project's successful efforts. Likewise, the burdens of the District's activities, such as the bonded indebtedness liens and acreage assessments, are proportionate to land ownership. (Facts ¶ 43, J.A. 35)

The fundamental issue in this case is sharply presented, therefore, by the stipulated facts and by the Court of Appeals holding. The lower court held that a special district which may otherwise be within the *Salyer* principles falls outside it when it becomes big. *Salyer* turns on function rather than size, on what the District does rather than how big it is or how many customers it serves. Therefore, the judgment of the lower court must be reversed.

The governing constitutional standard should be anchored to function rather than size for three reasons: (1) the functional test is clearly supported by this Court's precedents; (2) public policy considerations favor the focus on function; and (3) a constitutional test that depends on how large the governmental entity is or how many customers it serves would be unworkable because of the impossibility of drawing a constitutionally meaningful dividing line.

Each of these considerations will be separately discussed.

A. Precedent.

Avery v. Midland County, 390 U.S. 474 (1968), first extended the *Reynolds v. Sims* strict judicial scrutiny of voter classifications to the elections of general purpose local governmental bodies. *Avery* held that the Texas County Commissioners' Courts must apportion their electoral districts by equal population. While the Court was willing to extend the doctrine to "units of local government having general governmental powers over the entire geographic area served by the body," it was careful to distinguish those circumstances from what it correctly anticipated might be the situation presented in a case like this one involving a "special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents . . . ." 390 U.S. at 483.

In *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), the requirement was applied to a malapportioned junior college district, because the trustees performed "important governmental functions

. . . ." 397 U.S. at 54. Again however, the Court was careful to reserve judgment in situations involving units "whose duties are . . . far removed from normal governmental activities and . . . disproportionately affect different groups." 397 U.S. at 56.

Three years after *Hadley*, the Court in *Salyer* squarely faced the issue reserved in *Avery*—applicability of the one person, one vote principle to special purpose units of government. *Salyer* upheld the voting system of a user-initiated California water storage district. Like Arizona's agricultural improvement districts, the California scheme restricts the vote to landowners, but, unlike Arizona, weights the vote according to assessed valuation of the owners' holdings. Also like Arizona agricultural improvement districts, the California water storage district's primary purpose is to develop, store, and deliver water to benefit agricultural lands. The California district also has a significant non-reclamation function—flood control. The principal purpose of the California water storage district was the "acquisition, appropriation, diversion, storage, conservation and distribution of water . . . ." 410 U.S. at 723. "Incidental to the general power," districts may perform other functions, including "the generation and distribution of hydroelectric power." 410 U.S. at 723-24. The cost of the works developed were assessed against district land in accordance with the benefits accruing to the land. This Court stated the rule that governs such districts:

> We conclude that the appellee water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on land owners as a group, is the sort of exception to the rule laid down in *Reynolds* which the quoted language from *Hadley, supra* and the decision in *Avery, supra* contemplated.
>
> The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the

Tulare Lake Basin. 410 U.S. at 729.[12]

Decided the same day was a companion case, *Associated Enterprises, Inc. v. Toltec Watershed Improvement District, supra,* which upheld the organization election of a Wyoming watershed improvement district (Wyo. Stat. §§ 41-354.1 to 354.26 (Supp. 1975)), in which voting was restricted to landowners and a majority of voters and of acreage represented was required to carry a vote. The per curiam opinion stated:

> As in *Salyer, supra,* we hold that the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly. 410 U.S. at 745.[13]

The common feature—indeed the controlling feature—of this Court's holdings and rationale in *Avery, Hadley, Salyer* and *Associated Enterprises* is a recognition of the functional differences between general governmental units and special purpose entities. Elections for the governing bodies of governmental units whose powers cut across a substantial portion of the spectrum of governmental power, such as counties and cities, or whose powers are central to

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[12] In its only relevent decision since *Salyer* and *Associated Enterprises, Hill v. Stone,* 421 U.S. 289 (1975), this Court reaffirmed the exception of "special interest" districts from strict scrutiny review under the Equal Protection Clause. 421 U.S. at 295 n. 5.

[13] Significantly, the Court suggested another rationale (not specifically mentioned in *Salyer*) for upholding the constitutionality of such statutes. The Court pointed out that the Wyoming statute was enacted by a popularly-elected legislature and the special purpose district was created by a popularly-elected board of supervisors.

Similarly, the Arizona Legislature has closely overseen the agricultural improvement district enabling statutes. They have been amended 15 times since 1963. Those changes included such substantial matters as introducing fractional acreage voting, adding four at large directors elected on a one landowner, one vote basis, establishing electric ratemaking procedures, granting revenue bounding capability, requiring approval of such bonds by the Arizona Corporation Commission, and allowing payments in lieu of property taxes.

the operation of government, such as school districts, are subject to the same rule of strict judicial scrutiny as governs the election of state legislators. A different rule obtains, however, where the reach of authority is more limited. Where, as in *Salyer* and in this case, authority is limited to water conservation and related proprietary functions, the applicable rule is the one that permits a greater range of options to the State's policy makers.

Viewed functionally, the District in this case falls squarely within the *Salyer* test.

1. The District Has a Limited Purpose.

With respect to the limited purpose requirement, the Salyer opinion recognized that special districts may engage in several different functions. In *Salyer,* one of these functions was flood control. The Court's holding, however, focused on the district's primary purpose: "Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." 410 U.S. at 728.

Salyer, therefore, stands for the principle that a system for selecting a special district's board may reflect a preference for the primary purpose for which the district was created, even though other possible purposes (in *Salyer,* flood control) are subordinated.

Neither in *Avery,* nor *Hadley,* nor *Salyer,* nor in any other case has this Court said that the relevant test turns on the volume of the business or number of persons affected. The relevant inquiry is an inquiry into function, and the Salt River Project's investor-initiated functions are highly limited.

Starting from the premise that some kinds of functions qualify for special district status, the safest and most obvious candidates must be the storage, conservation, and delivery of untreated water, and the supply of electricity. As to water, *Salyer* and *Associated Enterprises* are squarely on point. And in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), this Court stated that electric ser-

vice is not "traditionally associated with sovereignty." 419 U.S. at 353. Water and electricity represent the kinds of service that can be performed, and frequently are, by private enterprise. Each is a self-contained business, completely independent from services that are rendered only by government.

Moreover, in fact the Salt River Project is not engaged in two independent enterprises. The stipulated fact—the controlling fact—is that the sale of electricity was undertaken not for its own sake, but for the primary purpose of reducing the cost of water delivery.

In implicit recognition of the dispositive nature of this stipulation, the appellees have made consistent efforts to recant it. The most recent effort is an argument that, while paragraph 17 of the Facts identifies the primary water purpose of the Salt River Reclamation Project and the Salt River Valley Water Users Association, it does not refer to the District (Motion to Affirm, p. 3 n. 2). This effort to avoid the controlling stipulation on a technical distinction between the "Project" and the "District" is inadequate even from a technical standpoint. The paragraph of the Facts specifically stating the identical primary purpose of the "District" is paragraph 34:

> The District was organized for the purpose of continuing the operations of the Association, the principal objective of which was to provide water for use within the geographic boundaries of the Association and District .... The primary legislative purpose of the District is to provide water to District lands. (Facts ¶34, J.A. 31).

The whole thrust of the *Salyer* test is that the dividing line between the constitutional and the unconstitutional depends on function rather than size. Focusing on function, the District clearly meets the "limited special purpose" requirement of *Salyer*.

2. Disproportionate Effects.

The disproportionate effect of the activities of this District on the landowners it serves is also undeniable. The principal disproportionalities derive from the original entrepreneurial purposes and risks taken by the landowners. The assets necessary for the original creation of the Salt River Project were the lands within the Association boundaries and the landowners' money. Without the District's acreage voting, the Association's property and powers would never have been transferred to the District, and there would be no District.[14] The sole causal motivation for the District's activities, including the sale of electric power, is to make more effective and less costly the conservation and delivery of water to Association lands.

It is the landowners who ran the risk of the Project's creation, and the landowners who have directly benefited from it. And it is the landowners who run the risk that if the Court of Appeals' judgment becomes law, a new board of directors, elected entirely by a customer constituency, could lower electric rates to a point that an acreage assessment by the Association or an acreage tax by the District would have to be imposed. In that event, the owner of a $200,000 city house on a one-third acre lot would not pay the same tax as the owner of a $200,000 50-acre farm. The farm owner would pay exactly 150 times the taxes of the city dweller's property, and the owner of a one-section (640 acre) farm would pay 1,920 times as much. But under the Court of Appeals decision, all three would exercise the same voting power to set in motion events leading to such a tax or assessment.

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[14] As was stipulated in this case (Facts ¶ 33, J.A. 31), the Court found it reasonable to conclude in *Salyer* that the landowners would not have subjected their lands to the liens and assessments unless they retained a dominate voice in control of the district they created. 410 U.S. 719, 732.

It is difficult to conceive how any district could affect any group more disproportionately than the Salt River Project affects landowners. The Court of Appeals' holding to the contrary is based on nothing more than a confusion between disproportionate effect and size. The lower court asserted:

> The electric utility operations of the District are so substantial in scope and are so closely interwoven with the water delivery functions of the District that it is not a special limited purpose district whose operations have a disproportionate effect on landowners as a class. (J.S.App. A-9, 613 F.2d at 185).

Ironically, the disproportionate effect on landowners is the very reason that the appellees brought this lawsuit. Appellees would change the historic purpose of the District, which is to benefit the lands by providing low cost water on a dependable basis. The landowner venture begun at the turn of the century and augmented by continuing landowner risk since that time has proven successful. The risk worked. The assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association. (Facts ¶55, 2 J.A. 39). All of this has been accomplished through electric rates comparable to those of the State's two largest privately owned electric utilities and an agricultural water subsidy that represents a return to its landowner-investors comparable to the dividends paid to common stockholders in comparable electric utilities. The risks that made the venture possible were proportionate to land ownership, and the benefits from the venture, water subsidies, are proportionate to land ownership. It is, of course, in the appellees' interest to change that arrangement by substituting a customer-controlled board of directors which would decrease the electric rates and also decrease the water subsidy. In that event, the disproportionate effect on landowners would in fact diminish.

Different cases have different facts. Allowing for those differences, the facts of this case are analogous in all material respects to the facts of *Salyer* which called into play the rational basis test. For the reasons discussed in this brief, particularly Section III below, the facts of this case clearly satisfy the rational basis test.

B. Public Policy.

In *Reynolds v. Sims* the Court cured the basic problems of voter inequality and the powerlessness of voters to express their majority will through the ballot. Extending *Reynolds v. Sims* to cities and counties posed more difficult theoretical problems, but it was defensible, because the governmental authority of those bodies sweeps across the entire spectrum of governmental services and in many ways affects people's lives in more important ways than any other governmental unit. However, elimination of the special/general governmental distinction—or making it turn on such undefined and undefinable criteria as the number of people who buy electricity—completely strips the constitutional test of its theoretical moorings.

Legislatures have created many special districts to implement fundamental policy choices rather than to allow local groups to make the fundamental policy choices. In this case, the specific policy choice is that essentially private water development should be encouraged by allowing risk-takers to subsidize their reclamation efforts by proprietary power sales. To deny the state the power to allow risk-based control systems for such undertakings is effectively to deny it the right to make that specific economic policy decision. *Reynolds v. Sims* now assures that the state legislature is best able to weigh the competing social interests at stake in any policy choice, including those entailed by the authorization of limited special purpose districts. Wise public policy militates in favor of leaving those substantive decisions to the legislature as long as that branch

strictly conforms to the democratic ideals of the one person, one vote principle. Judicial effort to make the fine-tuning adjustments at all levels of government would be bad constitutional law, bad federalism, and bad public policy.

D. Practicality.

Finally, the Court of Appeals' test is wholly unworkable. If the applicability of *Salyer* to a special district is to depend on its size or the number of customers, how large is too large, and how many customers is too many? The functional differences between general governmental units and special districts may not always be obvious, but at least they are rooted in principle and policy. They also have the benefit of existing precedent. Future cases, including this one, will build on that precedent and provide constitutional guidelines that are theoretically sound and practicably workable. The difference between the Texas County Commissioners' Courts in *Avery* or the school district in *Hadley* and an agricultural improvement district is understandable in theory and in practical application. In some instances, the distinction between general and limited entities may not be completely clear. But at least the distinction is anchored in firm constitutional theory which will provide a basis for case-by-case resolution, and for building up a body of consistent precedent. The difference between one quantum of electric customers and another provides no such basis.

Moreover, even if such a subjective standard were to be employed, it is difficult to see how the interests in this case are more severely affected than in *Salyer*. In 1975, the annual agricultural water subsidy amounted to an average of $8.89 per power customer. (Facts ¶84, J.A. 50). The central purpose of the Fourteenth Amendment is the protection of individual rights. How can an economic effect of $.74 a month amount to a constitutional violation, when in *Salyer* there was no violation? In *Salyer*, the district's refusal to sacrifice irrigation objectives for the sake of flood control caused Mr. Ellison to lose his job and left his home 15½ feet below the crest of a flood. 410 U.S. at 726, 738. If sheer

quantum of consequence upon the plaintiff is the measure of constitutional entitlement, then *Salyer* was a vastly stronger case than this one. But mere quantum is not the measure of "equal protection of the laws."

Precedent, policy and practicality all eschew the Court of Appeals test. The error must be corrected, and function rather than size continued as the controlling constitutional consideration.

III.

THIS COURT HAS CONSISTENTLY DEFERRED TO LEGISLATIVE CHOICES INVOLVING EITHER INNOVATIVE APPROACHES TO LOCAL GOVERNMENTAL PROBLEMS OR ECONOMIC POLICY DECISIONS.

Analysis of the two questions presented is aided by a principle common to both. It is a principle firmly established by this Court's precedents concerning the leeway that state legislatures enjoy in making policy choices, particularly with regard to local and economic problems.

There are two lines of cases.

A. Creativity and Experimentation in Local Government.

This Court has consistently recognized and encouraged creativity at the local governmental level in providing election schemes that depart from traditional governmental norms. In *Dusch v. Davis,* 387 U.S. 112 (1967), for example, the Court upheld the constitutionality of the City of Virginia Beach's "Seven-Four plan," under which four members of the eleven-person governing council were elected at large without regard to residence. The other seven were also elected at large, but each was required to reside within a designated one of the seven boroughs constituting the City of Virginia Beach. If the seven members required to live in a particular borough were considered as "representing" that borough, the population variations were extreme, ranging from Black Water, with a population of 730 people, to Bayside, with a population of 29,048. The Court nevertheless upheld the scheme, and observed as follows:

> The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. 387 U.S. at 117.

In a companion case to *Dusch v. Davis, Sailors v. Board of Education,* 387 U.S. 105 (1967), the Court upheld a system under which county school boards were elected, not by county electors, but by delegates from local boards. The Court's opinion observed:

> Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. 387 U.S. at 110-111.

The lesson was repeated in *Avery v. Midland County:* "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." 390 U.S. at 485.

Most recently, the Court in *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978), emphasized "the extraordinarily wide latitude that states have in creating various types of political subdivisions and conferring authority upon them." 439 U.S. at 71. The opinion in that case also states:

> Government, observed Mr. Justice Johnson, 'is the science of experiment,' *Anderson v. Dunn,* 6 Wheat. 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.' *Id.* See also *Town of Lockport v. Citizens for Community Action,* 430 U.S. 259 (1977).

The appellees contend that the legislative changes in 1969 and 1976, both of which broadened the number of people entitled to vote in Salt River Project elections, erode the appellants' contentions because they represent a departure from a strict acreage representation scheme. These changes do not erode the appellants' position. They

strengthen it. They are in complete harmony with the signal emanating from decisions such as *Dusch, Sailors,* and *Holt Civic Club,* that this Court's apportionment and voter qualification rulings should not be read as inhibiting the traditional role of local and state governments as political laboratories, whose governmental experiments—both successes and failures—can prove valuable to the rest of the country. If the States of Michigan (*Sailors*) and Virginia (*Dusch*) can experiment with schemes whose effect is to give some weight to people's votes heavier than others in the election of the governing boards of school districts and cities, then Arizona must have some creative leeway also. Surely it has acted safely within that leeway by providing for a fourteen member agricultural improvement district board, ten of whom are elected from districts using acreage proportionate voting, four of whom are elected from districts in which each landowner's vote counts the same, and a President and Vice President elected at large on an acreage basis.

As Mr. Justice Harlan observed in a dissenting opinion in *Hadley,* joined by Chief Justice Burger and Mr. Justice Stewart: "The need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity." 397 U.S. at 67.

The appellees' assertion that "the Salt River Project Agriculture Improvement and Power District is unique among local units of government in this country" may well be correct. (Motion to Affirm p. 16). The schemes that this Court approved in *Dusch v. Davis* and *Sailors v. Board of Education,* are also probably unique; our research has disclosed no counterpart to any of them. The clear message from those and other cases is that even where the governmental entity exercises general governmental powers (*Dusch* in-

volved a city and *Sailors* a school board), state legislatures enjoy a wide discretion in providing innovative methods for selecting the governing board where innovation represents a response to peculiar local problems.

The Constitution does not stifle experimentation. The fact that the Seven-Four Plan in *Dusch v. Davis* "seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside" was a factor that cut in favor of its constitutionality, and not against it. The same is true of the Salt River Project voting scheme, which probably is unique, as the appellees assert. It is the kind of uniqueness that this Court's decisions have not only approved, but encouraged.

B. Legislative Discretion in Economic Policy and Allocation of Resources.

There is a second reason that the Arizona Legislature should be given broad discretion to define the District's representational basis. While the Plaintiffs cast their suit in a procedural mold as a "voting rights" case, judicial alterations in the statutory basis for selecting members of the Board of Directors would really be just another way of changing the District's primary purpose. Indeed, that is the purpose of this lawsuit, just as it was in *Salyer*. The plaintiffs in *Salyer* wanted to remake the district to suit their desires by pursuing flood control at the expense of the irrigation objectives of the landowners who created the district. Both cases, therefore, presented the issue whether the selection of the primary purpose of governmental entities having limited functions should be determined by the legislature or by the courts. The *Salyer* judgment is obviously the correct one, because the choice among competing policy alteratives is essentially a legislative and not a judicial function.

Leaving the choice of primary purpose to the legislature rather than preempting it through constitutional adjudication is consistent with this Court's precedents in related areas. The net effect of the Arizona Legislature's acreage-based board representation is a subsidy for water conservation and use. Yet it is clear that without any constitutional impediment the Legislature could have provided such a subsidy directly. This Court has consistently held that Congress and the state legislatures enjoy a broad latitude in granting subsidies and otherwise allocating their scarce resources.[15] As observed in *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976), "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts'." Therefore, the identification of the primary purpose of the social security provision in *DeCastro* (providing certain benefits to the wife but not the divorced wife of a wage earner husband on the occasion of his retirement or disability) was upheld. This was so even though other objectives not selected by Congress were thereby thwarted and even though the effect of honoring Congress' primary objective was to treat wives and divorced wives unequally in ways vitally affecting divorced wives' financial subsistence. The Court's opinion states: "The old-age and disability insurance aspects of the Social Security system do not purport to be general public assistance laws that simply pay money to those who need it most. *That was not the predominant purpose* of these benefit provisions when they were enacted or when they were amended. Rather, *the primary objective* was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age." 429 U.S. at 185-186 (emphasis added.)

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[15] *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Ohio Bureau of Employment Services v. Hodery*, 431 U.S. 471 (1977); *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Alexander v. Fioto*, 430 U.S. 634 (1977); *Idaho Department of Employment v. Smith*, 434 U.S. 100 (1977); and *County Board of Arlington County v. Richards*, 434 U.S. 5 (1977).

Water is just as scarce a resource for the Arizona Legislature as social security dollars are for Congress. Indeed, of all Arizona resources, none is more scarce than water. There are few issues facing Arizona policy makers that are as important as how its water supplies are to be distributed among those interests that compete for them: residential development, mining, open space preservation, agriculture, industrial development, and others. Two realities necessarily undergird any decision. First, to whatever extent the State's water is used for one purpose, there will be less available for others. Second, where agricultural uses are favored, there are subtle but unmistakable impacts on other state policies, such as recharge of underground aquifers, encouragement of green belt areas, and disincentives to residential development.

The issue is broader than the allocation of scarce water resources among competing interests. The Salt River Project is engaged not only in water storage and delivery, but also conservation.[16] To the extent that these activities are successful, the total amount of available water is increased. And there is no question that the District's water conservation efforts have been successful. One of the largest issues before the Arizona Legislature over the past four years has been the allocation of the State's groundwater. (*See* Ariz. Rev. Stat. Ann. § 45-401 (Supp. 1980)). The problem has been much more severe in the Tucson area than the Phoenix area. The principal reason for the difference is the Salt River Project, which has provided the Phoenix area with a supply of surface waters, with correspondingly lesser demands on the underground supply.

This is not to say that there is direct evidence that in enacting the Agricultural Improvement District electoral statutes, Arizona legislators were directly motivated by environmental or water conservation considerations. The probable truth is that some were and some were not. The

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[16] The record discloses a broad range of water conservation activities. See Exhibits L, M, N, O, and P.

point is that in its selection of a method of voter representation for this specialized governmental entity, the Arizona legislature was necessarily dealing with a complex of sensitive and inter-related issues. Almost all of these issues are of economic policy, including allocation of the scarcest of its resources.

The optimum use of water or dollars presents the policy makers with the kinds of trade-off choices that lie at the heart of the legislative process. Both contexts involve the allocation of scarce resources and choices among difficult policy alternatives. In both contexts, the constitutional rule should be the same: "So long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy [or here, water utilization in a water-scarce state] are not subject to a constitutional straight-jacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972).

CONCLUSION

There is a limit to the range of policy choices that can and should be made by constitutional adjudication. This case provides the classic example.

Investor involvement in the Salt River Project began with creation of a private stock corporation with an acreage-based election procedure. A quarter of a century later, the Project acquired a governmental benefit and label.

Over the intervening four and a half decades, changes have been made. The appellees speculate that these changes were responsive to popular pressures. If so, the argument is strengthened that these are the kinds of matters that ought to be left to the political process—to legislative decision-making rather than judicial. Such is the thrust of this Court's decisions in many cases, and of its holding in *Salyer v. Tulare Lake Basin Water Storage District.*

Respectfully submitted,

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